THE PROMOTION OF A HUMAN RIGHTS CULTURE IN MALTA THROUGH ADEQUATE IMPLEMENTATION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract

The Council of Europe has for years insisted that all contracting parties to the Convention should have the right mechanisms in place to cultivate a human rights culture and to ensure the swift execution of judgments[1].

The establishment of the Human Rights and Equality Commission as a National Human Rights Institution (NHRI) in Malta is essential for the promotion of a human rights culture. However the White Paper does not enable one to determine what implementation mechanisms, if any, will be entrusted with the NHRI. It is suggested that the setting-up of a parliamentary committee based on the Belgrade Principles can work in conjunction with the HREC to ensure maximum fulfillment of Malta's human rights protection obligations and more importantly serve as a base for the expansion of a human rights culture. It is proposed to enable the NHRI to effectively work towards the enforcement of judgments through the recommendation of legislative changes to the parliamentary committee.

The proposal is for the Human Rights Commission to retain its proposed objectives whilst having the added responsibility of liaising with a Human Rights Parliamentary Committee that could in turn ensure that the necessary legislative changes are brought to the attention of Parliament.

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1 Recommendation CM/Rec(2008)2 "on efficient domestic capacity for rapid execution of judgments of the ECtHR" (Adopted on 6th February 2008). The Office of the Attorney General is currently responsible for the proposals for legislative changes that will be required for effective implementation of such of ECHR judgments. However this is the same body that is entrusted by Government to argue for the legislation, which is eventually found to be in breach of the Convention. Thus one could hardly describe the present situation as congruous.

1. Introduction

Embracing a human rights culture is imperative to better safeguard human rights. Thus, the creation of a National Human Rights Institution (NHRI) for Malta is a welcome initiative. If one had to analyse the legislation that is currently in place to protect human rights in Malta, one will find that there is more than adequate protection of human rights in this country. The problem persists however, with the actual implementation of human rights policies as determined by the various judgments of the European Court of Human Rights (ECtHR).

Malta can be said to have two levels of human rights protection, the first being the Constitution of Malta and the second being the European Convention Act. Malta joined the Council of Europe in 1965 and ratified the European Convention on Human Rights (ECHR) a few months later in January of 1967. Nevertheless the important milestones took place in 1987 with the coming into force of Act XIV of 1987 that transposed the ECHR into Maltese legislation, and with the introduction of the right to individual petition[2]. This latter event marked the start of a series of landmark judgments being handed down by the ECtHR as a result of which, a number of legislative amendments have had to be made in order to keep the country in line with the ECHR, and by virtue of which compensation was given to victims of human rights violations.

This being said, a number of pertinent issues remain outstanding and further progress is required in order to truly achieve a human rights culture where the State can swiftly and promptly implement measures to execute an ECtHR judgment without delay.

2. The current procedure: from obtaining a judgment to enforcing it

When a person feels that any of his rights enshrined by articles 33 to 45 of the Constitution[3] have been or are likely to be violated, he can apply for redress to the First Hall of the Civil Court, which has original jurisdiction to hear and determine any applications filed before it.

Any appeals arising from the judgments handed down by the First Hall would then be heard by the Constitutional Court[4].

Following the introduction of the right to individual petition, an aggrieved person may file a fresh application before the ECtHR. It is important to keep in mind that the ECtHR is not an appellate court and therefore the application filed before it has no ties with the case filed in. Once the ECtHR has heard a case, a procedure established by the Rules of the Court[5] and the ECHR itself kick in.

The first hurdle that an application has to overcome is its compliance to the admissibility criteria found in article 35 of the ECHR. The two most important admissibility criteria are the need to have exhausted all domestic remedies before referring the case to the ECtHR and the second is that the application must be filed within 6 months from when the domestic Court would have handed down the judgment (Protocol 15 will further reduce this time limit to 4 months)[6]. Another admissibility criterion relates to whether the merits of the case are similar to pilot judgments that would have already been handed down by the EctHR. If an application is found to be inadmissible, the ECtHR will refrain from taking cognizance of the application. In 2014, of 40 applications concerning

[2] M Sammut, P Cuignet, D Borg, Malta at the European Court of Human Rights (1st, Progress Press, Malta 2012) p. 21-22

[3] Constitution of Malta 1964 s. 46

[4] Constitution of Malta 1964 s. 46(4)

[5] Rules of the Court (as last amended on st July 2014)

[6] Protocol 15, ECHR (opened for signature on 24th June 2013)

Malta in 2014, 32 were declared to be inadmissible[7].

The Committee is entrusted with ensuring that judgments of the ECtHR are executed as quickly as possible. The Committee has established a two-tier monitoring system[8]. The Committee may place cases under its enhanced-supervision procedure to allow more liberty for the Committee to explore how best to help a State put measures in place to comply with the judgment in question. Alternatively, the Committee may place cases under the standard-supervision procedure, were the Committee will simply analyse the case and await feedback from the State on how the execution is progressing.

The body responsible on behalf of the State varies from one State to the other. In Malta, the Office of the Attorney General, is entrusted with the drafting of the necessary action plans and reports and which must take into considerations measures to execute ECtHR judgments, make follow-ups with government departments on measures being taken and update the Committee accordingly.

3. Implementation of ECtHR judgments

An ECtHR judgment can be executed through the payment of just satisfaction, the adoption of individual measures and the adoption of general measures. The payment of just satisfaction is the most straightforward means of execution. This is the only measure that the ECtHR can directly order a State to comply with[9]. The ECtHR has, over time, established a respected practice of quantifying the damages due and the State will typically pay the liquidated amount to the victims. It has been argued on more than one occasion that it should be the States themselves who should decide what the amount due should be[10], but as things stand today, it is still the ECtHR, which has the ultimate say on such matters.

Once the case file is transferred to the Committee of Ministers, the latter will invite the State in question to present an 'action plan' on what individual and general measures it is planning on taking in order to ensure that it is in line with the judgment handed down by the ECtHR.

Such individual measures may include the reopening of proceedings on a domestic level. A State is encouraged to try and put the victim in the position he was in before the violation took place, albeit this not always being possible.

In fact, the Committee of Ministers has given instructions to states to ensure that these have the right procedures in place that enable the possibility of reopening proceedings on cases that would have already become res judicata[11].

The final stage before execution is deemed to be complete is the implementation of general measures as these would be required in order to reduce the incidence of similar violations. This is typically the most problematic stage of the execution. The most common general measure taken by a state is the amendment of legislation. On more than one occasion the ECtHR has pointed at particular pieces of legislation and indirectly suggested that that legislation should be amended.

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7 Coeint, " (Coeint,) <http://www.echr.coe.int/Documents/CP_Malta_ENG.pdf> accessed 7th November 2015

8 The process was developed as a result of "High Level Conference on the Future of the European Court of Human Rights" – Interlaken Declaration (19th February 2010)

9 E Lambert Abdelgawad, The Execution of Judgments of the European Court of Human Rights (nd , Council of Europe, Strasbourg 2008) pg. 13

10 Report of the Group of Wise Men to the Committee of Ministers, 979bis Meeting, 15th November 2006

11 Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights.

Many states comply and present action plans detailing out the amendments that are planned on being implemented. Nevertheless, the implementation of general measures has been the cause of controversies and debates within the Council of Europe for many years. Once execution is completed, the State will present an action report to the Committee of Ministers explaining the changes made as a result of the ECtHR judgment.

4. The difficulties in implementing general measures

General measures introduced by a State following an ECtHR judgment may not always go down well with the general public or with the government then in power.

The execution of judgments depends primarily on the State's political willingness to truly recognize the importance of the judgment and on complying with the ECHR rules[12]. The technical complexity posed by the breaches identified in a particular judgment may be another hindrance to the implementation of such judgments[13].

Adopting general measures is not always an easy and direct procedure but may involve extensive legislative reform, especially since laws are interrelated. On the basis of this, it is sometimes a long process before the necessary change can be affected.

In addition to this, a State could also be faced with legitimate doubts on how best to proceed with the implementation of general measures. A judgment of the ECtHR will focus on the merits of the case. Consequently this may give rise to substantive impediments to the implementation of the same as the judgment does not make it sufficiently clear as to how best a State should proceed[14]. As the Committee of Ministers is aware of this problem, it has sought to rectify it by creating specialized supervision. Amongst many options available to a State, there exists the possibility of having round- table discussions to find a way forward which all involved parties agree to.

Having said that, the underlying problem remains; there is only so much that the Committee of Ministers can do to ensure that judgments are adhered to. One option is to issue an interim resolution[15] through which the Committee of Ministers can express their opinion on the measures, or lack thereof, being taken by the State in question. On more than one occasion, the Committee has resorted to this method in order to exert pressure on a State to proceed with execution. The Committee has used different approaches depending on the State in question, the reasons for not executing a judgment and on whether the State has actually tried to implement the necessary measures.

In the case of Ben Yaacoub vs Belgium[16], the Committee applauded Belgium for its effort in closing off the case and remarked that its supervisory role shall continue in the following Committee meeting[17]. This approach can be described as being quite soft, but enough to warn the State that the Committee has its eyes on it and therefore more efforts should be made to implement measures quicker.

Interim resolutions can also be quite tough and the Committee has had to use strong words in a few exceptional cases, which required it to hold its ground and ensure compliance from Member

[12] "CDDH Report on whether more effective measures are needed in respect of states that fail to implement court judgments in a timely manner" (Adopted on 29th November 2013) Section I (3)

[13] Ibid. Section II (6)(ii)

[14] Ibid. Section II (6)(iii)

[15] Rule 3 of the Rules adopted by the Committee of Ministers for the application of Article 46, paragraph 2 of the European Convention on Human Rights. (adopted 10th January 2001)

[16] Ben Yaacoub v. Belgium, 9976/82, ECHR 27 Nov 1987

[17] Interim Resolution DH (88) 13 of 29th September 1988.

States. In the case of Loizidou vs Turkey[18] the Turkish government completely disregarded the ECtHR's findings, which ultimately led to four interim resolutions being issued over a span of four years by the Committee of Ministers in which increasingly tough words were used. The Committee described the Turkish government's lack of action as being "unprecedented"[19].

In the separate case of Ilascu and Others vs The Republic of Moldova and the Russian Federation[20], the Committee of Ministers was again required to take a tough stance against the Member States involved. In fact it went as far as to highlight the fact that compliance with ECtHR judgments is a fundamental aspect of being a member of the Council of Europe. By so doing, the Committee suggested that failure to comply with ECtHR judgments could lead to the expulsion from the Council in terms of Article 8 of the Statute of the Council of Europe[21].

The second option available to the Committee of Ministers is making use of Article 8 of the Statute of the Council of Europe[22]. As mentioned above, the Committee has the authority to dismiss a State from holding a seat in the Council. Having said that, the Committee never even went close to considering this option despite hinting towards its existence in the abovementioned cases. The use of this article would be a highly criticized action as it would mean that the Committee has failed in enforcing a judgment of the ECtHR, has failed in its negotiations with the State. Should the Committee resort to this action, the end result will still mean that the victim, and perhaps others in a similar situation, will continue to suffer the consequences of the violation taking place. Thus one can see the justification in this clause never actually being applied and one would hope that it never would be.

5. Defying the European Court of Human Rights

There have been a number of occasions in which the authority of the ECtHR and the Committee of Ministers has been tested to its limit. One such ongoing dispute involves the blanket ban on prisoner voting rights in the United Kingdom. The Hirst vs U.K (No. 2)[23] judgment delivered in 2005 stated that the U.K was in violation of the Convention when applying a blanket ban on prisoner voting rights in accordance with the Representation of the People Act[24]. The ECtHR, whilst accepting the possibility of some prisoners being barred from voting, refused to accept the blanket ban imposed by the U.K arguing that it was disproportionate.

In the years that followed, over 2,500 applications were filed before the ECtHR concerning similar issues[25], and in fact the in Greens and MT vs U.K judgment, the ECtHR noted that the situation was becoming a "threat to the future effectiveness of the Convention"[26]. The debate in the U.K raged on, and a bill even made it to parliament to amend and ultimately remove the blanket ban and allow prisoners serving less severe sentences to vote. The bill was however heavily defeated in the House of Commons. Back in 2012 the current Prime Minister stated that"prisoners are not getting the vote under this government"[27].

[18] Loizidou v. Turkey, 40/1993/435/514, ECHR, 23 February 1995

[19] Interim Resolution ResDH (99) 680 of 6 October 1999, Interim Resolution DH (2000) 105 of 24 July 2000, Interim Resolution ResDH(2001) 80 of 26 June 2001 and Interim Resolution ResDh(2003) 174 of 12 November 2003, concerning the judgment of the European Court of Human Rights of 28 July 1998 in the case of LOIZIDOU against Turkey.

[20] Case Of Ilaşcu And Others V. Moldova And Russia, 48787/99, ECHR 8 July 2004

[21] Interim Resolution ResDH(2006)26 of 10 May 2006

[22] Statute of the Council of Europe (5th May 1949, London)

[23] Hirst vs U.K (No. 2) (App No. 74025/01) ECHR 2005-IX

[24] Representation of the People Act 1983

[25] Greens and M.T vs U.K (App. No. 60041/08, 60054/08) ECHR 2010 s.111

[26] Ibid.

[27] UK House of Commons Parliamentary Questions on 24th October 2012, Volume No. 551, Part No. 55, Column 923

Throughout this saga, the Committee of Ministers issued an interim measure expressing disappointment in the lack of progress being made by the U.K authorities[28], and in a communication sent to the Committee of Ministers by UNLOCK, a non- governmental organization, they argued that it was clear that the government had no intention of legislating on the matter[29].

In Malta there were also a number of cases, which have been placed under the enhanced supervision procedure of the ECtHR, which as explained above, allows the Committee of Ministers to directly supervise the execution of a judgment through a number of resources. One group of cases that was placed under enhanced supervision, and as a result of which, changes and developments are still ongoing, is that related to violations of Article 5 of the ECHR in relation to the treatment of migrants.

In a number of separate cases, such as the leading case of Suso Musa vs Malta[30] the ECtHR found a number of problems in Malta's immigration policy. As discussed in a number of action plans presented by Malta to the Committee of Ministers during the ongoing supervision of the execution of judgments, Malta is currently going through a number of changes to its policies and practices. Much has been improved over the past few years including the upgrading of the facilities used for housing and holding of migrants, as explained by the updated action plan sent by Malta to the Committee in June 2015[31].

Nevertheless, the amendments to the Immigration Act still haven't taken place despite having been in the pipeline for over a year. One such amendment is that of article 25A of the Immigration Act that addresses the release from detention of migrants when this is not required and when there is no prospect of return. Additionally, there is also the deletion of article 25A(11) barring the release of persons whose identity cannot be verified, something that Malta had been criticized for by both the ECtHR[32] and the Committee of Ministers[33].

Another set of violations, which have been consistently flagged by the ECtHR are the violations to article 1 of protocol 1 of the ECHR. In the landmark judgment of Amato Gauci vs Malta[34], the ECtHR found that Malta had failed to strike a fair balance between the rights of property owners and the right of the state to put into effect housing policies to ensure a fair distribution of houses and the protection of tenants.

The case revolved around Act XXIII of 1979, which allowed for temporary emphytheusis to be converted into leases upon the expiration of the said emphyteutical concession. This situation ultimately led to the tenant being allowed the continued enjoyment of the property at the expense of the owner who was forced to enter into a lease agreement.

In an action plan submitted to the Committee of Ministers the Maltese state made reference to Act X of 2009 and argued that this made significant amendment to legislation concerning leases. Nevertheless, this legislation fails to address those unilateral cases created as a result of the 1979 Act. The Maltese State argued that it is working on a plan to ensure that over the coming years, the situation is remedied and eventually these forced-leases should come to be in line with Act X of 2009. The government has stated that it is currently holding a 'social impact assessment' to study

(www.parliament.uk) http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm121024/de bindx/121024-x.htm

28 Interim Resolution CM/ResDH (2009) 160 (3rd December 2009)

29 DH – DD(2010) 113 (nd February 2010)

30 Suso Musa vs Malta, 42337/12, ECHR 2013

31 DH-DD(2015)707

32 Louled Massoud vs Malta (App. No. 24340/08) ECHR 2010 s.44

33 Times of Malta, <http://www.timesofmalta.com/articles/view/20141205/local/council-of-europe-committee-wants-malta-to-reconsider-immigration-act.546992> accessed 10 November 2015

34 Amato Gauci vs Malta, 47045/06, ECHR 2009 s. 63

what the effects will be on the general population once rents are increased to be in line with the ECtHR judgments handed down in this regard[35]. That said, the Maltese authorities haven't updated their action plan for the past eighteen months[36].

It is in light of such situations that one poses the question of how a State can put the execution of ECtHR judgments on the forefront of its agenda. Locally, the Office of the Attorney General is responsible for the execution of judgments. This is the same office which must also represent Malta and the Maltese government in Strasbourg.

This gives rise to a discordant state of affairs as the same entity that is tasked with arguing for Malta's position before the ECtHR must then draft changes to legislation and put in place measures to execute a judgment where the court would have determined that Malta's position would be constituting a breach of human rights.

6. White paper proposed by the Government of Malta

The Government of Malta presented a white paper in December 2014 with the aim to continue to reinforce and put Malta as a global player when it comes to the protections and freedoms enjoyed under established international human rights standards.

The Government's proposal is twofold: to enact robust human rights and equality legislation and an equally strong authority that enforces such legislation in conformity with the Paris Principles and the Belgrade Principles and the EU equality directives[37]. The foremost proposal of the white paper is for the setting up of an independent National Human Rights Institution (NHRI) in accordance with the Paris Principles which has the mandate, resources and authority to act as Malta's focal point on human rights issues.

The White Paper notes that the Universal Periodic Review, an arm of the UN Human Rights Council recommended that Malta should establish a National Human Rights Institution in full conformity with the Paris Principles. This recommendation was echoed, almost verbatim by the International Covenant on Civil and Political Rights (ICCPR) Periodic Report.

7. The Paris Principles

The Principles relating to the Status of National Institutions adopted by the United Nations General Assembly resolution 48/134 of 20 December 1993 (The Paris Principles), clearly state that a national institution ought to be given as broad a mandate as possible, having an advisory responsibility towards the legislative that is exercised, at its' own prerogative, through opinions, recommendations, proposals and reports concerning human rights issues.

Significantly, the Paris Principle task the NHRI with the examination of legislation and administrative provisions that are in force, as well as legislative proposals, and with making the requisite recommendations to ensure that all such instruments conform to the fundamental principles of human rights.

Amongst the recommendations made by the Paris Principles one notes that NHRIs should advise governments on human rights compliance, promotion and protection.

[35] Reply to P.G 13523 (Leg. No. XII) on 14th January 2015

[36] DH-DD(2014)789

[37] Ministry for Social Dialogue, Consumer Affairs and Civil Liberties, Toward the Establishment of the Human Rights and Equality Commission (White Paper, p.7)

More pertinently, the NHRIs are tasked with the effective implementation of the international human rights instruments to which a State is a party. This aim can be achieved through recommendations to the competent authorities and proposals for legal reforms and administrative practices. Moreover, the Paris Principles recommend that the national institution maintain consultation with other bodies that are responsible for the promotion and protection of human rights.

Significantly the Principles note that the effectiveness of NHRIs is intrinsically linked to both what it would otherwise be empowered to do, and the perceptions which such NHRIs enjoy from their individual stakeholders.

8. The Belgrade Principles

The Belgrade Principles outline the needs for independence and accountability in the establishment of a National Human Rights Institution, in compliance with the Paris Principles. In addition to this, the Belgrade Principles note that NHRIs should report directly to parliament, and should submit an annual report thereto. These principles task parliaments with taking cognizance of such reports, and debating the priorities of NHRI through a principled framework that respects the NHRI's independence.

The Belgrade Principles expressly state that Parliaments should hold open discussions on the recommendations issued by NHRIs[38]. As to the forms of co-operation that could be adoperated between Parliaments and NHRIs, the Belgrade Principles specifically state that NHRIs and Parliaments should establish formal frameworks to discuss human rights issues that may be of common interest.

Pertinently, the Belgrade Principles state that:

> *20) NHRIs and Parliaments should agree the basis for cooperation, including by establishing a formal framework to discuss human rights issues of common interest.*
>
> *21) Parliaments should identify or establish an appropriate parliamentary committee which will be the NHRI's main point of contact within Parliament.*

The Belgrade Principles go on to state that where necessary, a memorandum of understanding should be undertaken by a Parliamentary Committee and the NHRI to develop formalized relationships relevant to their work. The recommendation is for the members of the specialized parliamentary committee to maintain a constant dialogue with the NHRI, both as a means to facilitate the exchange of information, and to enable the NHRI to adequately perform its advisory role, particularly with reference to human rights obligations, and to allow for the exercise of its oversight and scrutiny functions[39].

The Belgrade Principles recommended that NHRIs be consulted by parliaments in the enactment of new legislation and in other legislative processes as a means to ensure human rights compatibility. This function can be performed by the NHRI through the proposals for amendments that ensure harmonization with national and international human rights standards through the implementation of human rights obligations arising out of treaties and human rights judgments of courts. Additionally, parliaments can peruse of the technical capacity held by NHRIs to ensure compliance of legislation with international human rights obligations.

Another function that is highlighted by the Belgrade Principles is that both parliaments as well

[38] Belgrade Principles on the Relationship Between National Human Rights Institutions and Parliaments (2012, s. 18)
[39] Ibid. (s. 25 – 26)

as NHRIs ought to monitor government's response to judgments of the courts, including therefore not only local courts, but also international ones, concerning human rights.

The Belgrade Principles specifically state that NHRIs should have the function to review judgments that are delivered against the state, concerning human rights, by both national and international courts, and make the requisite suggestions to Parliament, that ought to give proper attention to any such proposals, in order to ensure expeditious and effective compliance with any such judgments.

9. Proposed legislative initiative

The White Paper envisages the enactment of the Human Rights and Equality Commission Act that will establish the Human Rights and Equality Commission that will effectively perform the role of NHRI.

In line with the Paris Principles, the essential requirements for the NHRI were listed as being a broad mandate, formal and functional independence from government (including its budget spending), a transparent selection and appointment process for its members and adequate resources to carry outs its mandate. In addition to this, the white paper suggests that the NHRI should be accredited by the International Co-Ordinating Committee (ICC) of National Institutions for the Promotion and Protection of Human Rights.

The White Paper notes that the Commission will be directly answerable to parliament, and will enjoy financial and political independence that are guaranteed by law. The approval of the Members of the Commission will be a prerogative of Parliament. Additionally, it shall be empowered to issue opinions on human rights and equality matters, make legislative and policy proposals, and where necessary criticise the government or its entities.

The HREC will be given investigative powers and the power to issue binding opinions. The White Paper notes that it is envisaged that the Commission will also serve to monitor the implementation of the human rights provisions found in Maltese law and international human rights treaties ratified by Malta, and issue reports, opinions and propose legislative changes as it deems fit. Additionally, the White Paper notes that the Commission will be tasked with addressing human rights issues and with monitoring potential or systemic violations of human rights.

The White Paper notes that the HREC should have a clearly defined role that should be independent of governmental influence; a recommendation that is in line with most international treaties. Additionally, the White Paper recommends the adoption of a programme-led approach, whilst encouraging consultation and participation, and retaining adequately qualified members of staff.

The enforcement mechanisms that the White Paper makes note of includes the provision of a uniform and efficient complaints mechanism and the provision of legal aid to complainants. The White Paper also makes provision for the NHRI to provide technical input to Government in the context of law or policy-making.

The White Paper takes cognisance of the problem with the lack of a rights based approach in public discourse and recognizes that the HREC should raise awareness to encourage national discourse which is respectful of core human rights values. Moreover, the White Paper lists the public awareness of all rights, and human rights education to address this gap[40].

[40] *The HREC needs to look at developing intersectional frameworks with alternative approaches to legislation and policy change, thus allowing the HREC to approach human rights and equality from beyond the human rights discourse and the legal approach. Such approach would make the HREC a responsibility-sharing entity with*

Crucially however, whilst the recommendations of the White Paper reflect, to a large extent, the pre-requisites set out by the Paris Principles, and a number of subsequent resolutions adopted by the Parliamentary assembly of the Council of Europe, these recommendations fall short of establishing a mechanism that would play a direct role in the enforcement of judgments delivered by the ECtHR.

One of the outcomes of the consultation submissions listed in the White paper includes the setting up of a Human Rights Parliamentary Committee that would be tasked with reviewing future legislation to ensure its conformity with international human rights treaties and specifically to monitor judgments of the ECtHR that may have an impact on Maltese legislation. This submission was however not reflected through the proposal for the legislative initiatives proposed by the Government of Malta.

Furthermore the proposed legislation fails to address the problem that is caused by the fact that the Office of the Attorney General is also tasked with executing judgments of the ECtHR where a breach of human rights would have been identified. Despite having two bills in the pipeline, questions regarding execution of judgments have remained unanswered, and unless a proper framework is established whereby judgments can be executed through pre-established channels and regulations, it is likely that the effectiveness of the proposed measures will remain hindered.

10. The relationship between NHRIs and Parliaments

Reference is made to the resolution adopted unanimously by the Committee on Equality and non-Discrimination of the Council of Europe on the 5th March 2014[41] that called upon national parliaments of the Member States to set up a parliamentary committee responsible for human rights and non-discrimination issues. The resolution also calls for parliaments to establish formal co-operation channels with NHRI's whilst respecting their independence.

The functions of a NHRI are such that these serve as a check and balance on the legislative, the executive and the judicial branches of the State in relation to human rights issues. Thus better engagement of the NHRIs in parliament serves to facilitate the creation of a human rights culture.

Additionally, the resolution called upon parliaments to seek advice from NHRIs in the preparation of draft legislation to ensure compliance with international human rights treaties and decisions of supervisory bodies, including specifically judgments of the European Court of Human Rights. Additionally, NHRIs can contribute towards the work of parliamentarians by providing independent advice, facilitate training, increase accountability and advise on human rights implications[42, 43].

Moreover, the resolution also called upon the NHRIs found in Member States of the Council of Europe to report on an annual basis on issues relating to equality, human rights and non-discrimination, and to request a discussion on those key issues that would have been identified.

The Abuja Guidelines on the Relationship between Parliaments, Parliamentarians and Commonwealth NHRIs, which were adopted in 2004 call for the development of a working relationship

value-added actions when it comes to bringing about social justice in Malta, and such model could take a larger role in geopolitical matters to challenge one-dimensional views about Malta.

41 K. Zappone (2014) Parliamentary Assembly of the Council of Europe, 'Improving co-operation between National Human Rights Institutions (NHRIs) and parliaments in addressing equality and non-discrimination issues.'

42 Commonwealth Nations (2004), The Abuja Guidelines On The Relationship Between Parliaments, Parliamentarians And Commonwealth National Human Rights Institutions, (2004, Abuja)

43 C. Pougourides (2010) Parliamentary Assembly of the Council of Europe, 'Report on the implementation of judgments of the European Court of Human Rights', p. 39

between both NHRIs and parliaments. The main thrust of these guidelines is to allow for the exchange of resources and for the establishment of a forum where the data that is generated by the NHRI can be debated, and formally presented to the legislative.

Reference is also made to the Brighton Declaration that states that States should enhance the monitoring of execution of judgments of the European Court of Human Rights by developing domestic mechanisms that ensure rapid execution and by setting up the requisite action plans.

Different structures have been adopted in different countries in order to formalise the relationship between NHRIs and parliaments. A member of the parliamentary committee on human rights sits on the board of trustees of the German NHRI. Most NHRIs make their reports available to parliament[44]. In Denmark, the NHRI is mandated directly by parliament to comment on governmental reports, draft laws and ministerial directives[45].

A common feature that is outlined in the relationship between NHRIs and Parliaments is also the provision of the NHRIs annual report to parliament. This serves to create accountability, particularly surrounding issues of enforcement and allows both stakeholder to closely monitor any progress that is made. The report generally also serves to formalise recommendations by the NHRI to parliament. Such a report can be used to foster parliamentary debate on human rights issues, which in turn could serve to allow for increased prominence to be given to such issues.

The relationship between parliament and NHRIs could also be used to foster engagement by parliamentarians on human rights, equality and non-discrimination issues. A formalized structure such as a parliamentary committee can serve in good stead to ensure that frequent systematic debates are held on such issues.

The resources available to NHRIs can also facilitate a proper follow-up procedure for the recommendations that are given by international monitoring bodies and treaty bodies.

More pertinently, the NHRIs could play a fundamental role with informing parliamentarians about judgments delivered by local courts and the European Court of Human Rights as a means to ensure effective compliance by facilitating the harmonization of existing and proposed legislation to any such judgments. NHRIs will have the requisite resources to prepare human rights impact assessments of draft legislation[46].

11. Proposal for engagement of Parliament and the NHRI in the Maltese context

It is submitted that parliament ought to establish a specific committee that deals specifically with equality, human rights and non-discrimination issues. Such a committee could work in tandem with the NHRI to increase awareness on such issues namely by taking cognizance of any reports issued by the NHRI and by reviewing legislation to ensure compliance with the national and international human rights obligations as well as to take cognizance of decisions given by international human rights bodies, including the Committee on Equality and non-Discrimination of the Council of Europe, as well as judgments delivered by local courts and the European Court of Human rights against Malta or against other States.

[44] Fundamental Rights Agency, (2010) 'Report on National Human Rights Institutions in the EU Member States – Strengthening the fundamental rights architecture in the EU', p. 28 ,32

[45] Danish Institute for Human Rights, (2012) 'Annual Report' 2012,

[46] K. Zappone (2014) Parliamentary Assembly of the Council of Europe, 'Improving co-operation between National Human Rights Institutions (NHRIs) and parliaments in addressing equality and non-discrimination issues (Sec. B)

Additionally, it is proposed to have a liaison officer, which would ideally be the chairperson of the HREC that would be tasked with maintaining the co-operation with parliament by preparing the necessary briefings, reporting on systemic issues and attending the sittings of the parliamentary committee.

Safeguards must be made in the legislative instrument through which the NHRI is set up to ensure that the views of the NHRI are not politicized so as to remove perceptions of political bias.

A number of models could be considered for the creation of such a committee. The first model could be one where the committee could be given the remit across all areas, which could allow for the prioritization of human rights in parliamentary business. This could however result in differing standards being applied to different pieces of legislation.

Another model would be for the committee to specifically focus on human rights issues. Such a model could foster accountability, but could result in marginalization of such issues, and thus ineffectiveness, due to a weaker political mandate.

That being said, in order to achieve any level of accountability, it is vital for there to be the political will for effective oversight. This needs to be followed up with the requisite hearings of the committee, hearings in the parliamentary plenary, questions and inquiries where necessary[47].

It is suggested that if the State were to seek to better enforce the judgments being delivered by the European Court of Human Rights, provided that the requisite political will is present to ensure the continued work of the committee, a single-focus parliamentary committee ought to be implemented.

It is suggested that one of the over-arching goals for the parliamentary committee, which would be established with a view to afford better safeguarding of human rights, would be the scope of creating national discourse with regards to judgements delivered by the ECtHR against the State of Malta, where a breach of the rights enshrined by the Convention is determined, with a view of proposing legislative amendments necessitated by such judgments.

Article 46(1) of the European Convention on Human Rights dictates that member states have an obligation to comply with judgments of the European Courts, which are binding on such Member States[48]. The effectiveness of such judgments depends on the implementation thereof by the State.

Reference is also made to Recommendation 2008(2) to Member States on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights which states that Member States ought to designate a coordinator of execution of judgments at a national level that would have the requisite powers and authority to 'acquire relevant information; liaise with persons or bodies responsible at the national level for deciding on the measures necessary to execute the judgment; and if need be, take or initiate relevant measures to accelerate the execution process'. It is suggested that a parliamentary committee on human rights would be the appropriate forum within which the implementation of judgments of the European Court as it enjoys the audience of those with the necessary authority to execute and implement such judgments.

[47] R. Pelizzo, R Stapenhurst, D Olson (2006) World Bank Institute, Parliamentary Oversight for Government Accountability,

[48] D Harris et al, (nd ed., Oxford University Press, 2009) Law of the European Convention on Human Rights p.30.

12. Effective parliamentary oversight

It is suggested that effective parliamentary oversight of human rights ought to have a goal-based approach that sets expectations for both members and stakeholders and allows for the review of effectiveness.

Thus it is recommended that the NHRI should seek to ensure the increased compliance with human rights through the assessment of human rights deficits that have been acknowledged by the ECtHR, and it should be empowered to call upon government to account for the failures to protect the rights of people within the country.

The relevant factors in determining whether the NHRI is effective, one ought to consider the resources that are made available to it, political support and its powers[49].

Amongst the challenges to parliamentary oversight one can list the political realities of the country, shifting national discourse and interests, the various interests of different stakeholders, lack of resources and availability of human rights expertise.

It is suggested that in order to ensure that such a committee is effective, a number of goals are set for it by its stakeholders for the committee, would include the NHRI, parliament, as well as any other NGOs working in the sector. These stakeholders could define the priority areas for the committee and determine the aims that it ought to achieve. Such a process would also serve to strengthen the mandate of the committee and would also allow it to obtain legitimacy through the support of the stakeholders[50].

The specificity of the goals will also enable the committee to overcome issues related to the willingness of the committee to discuss sensitive human rights issues. Thus, the committee ought to have specific goals that are definable and achievable. That being said, the choice of such goals should not be such as to limit the mandate of the committee. Thus it is suggested that the committee ought to have the aim of implementing policy and legislation and increasing accountability on human rights practices which are found to be unlawful.

13. Risks of the parliamentary committee system

The proposal for enforcement of judgments of the European Court of Human Rights through a parliamentary committee is subject to a number of risks. Principally amongst which is the fact that the issues being brought before the committee, and the discourse that arises therefrom may be subject to political whims of the members of the committee. The engagement of the members of the committee could be directly proportional to the effectiveness thereof.

Similarly, particularly in the Maltese scenario of a dual-party system, partisanship could be particularly problematic. Creating a political bias on any human rights issue would create difficulties in achieving proper and just remedies for any human rights breaches. That being said, it could also be argued that the politicization of any issue could result in increased accountability on the executive; a process that would allow for increased effectiveness in the implementation of judgments of the European Courts of Human Rights.

Another risk that could be faced by the parliamentary committee could be the focus of single-mandate committees that would result in certain issues not being brought to the attention of

[49] P. Webb, K. Roberts, (Dicksom Poon School of Law, King's College, 2014) Effective Parliamentary Oversight of Human Rights, A Framework for Designing and Determining Effectiveness, p. 9

[50] D. Deephouse, M. Suchman, Legitimacy in Organizational Institutionalism, in R. Greenwood, C. Oliver, R. Suddaby, K. Sahlin (Eds.), The SAGE handbook of organizational institutionalism, London: SAGE (2008).

parliament or not being appropriately prioritized[51].

It is however suggested that the benefits of having a parliamentary committee, greatly outweigh the risks that are mentioned herein.

14. UK Joint Committee on Human Rights

Reference is made to the UK Joint Committee on Human Rights ('Joint Committee'), which was established by virtue of HC Standing Order No. 152B[52], and which is composed of members from both the House of Lords and the House of Commons. This committee is tasked with scrutinizing every Government Bill for compatibility with matters relating to human rights arising from the European Convention on Human Rights and other international obligations. The

Committee also reviews the executive's response to court judgments on human rights issues and is empowered to conduct inquiries on topics chosen at its own discretion.

It is apt to note that the standing order allows for a very wide remit to be granted to the committee, which is tasked with considering matters relating to human rights in the United Kingdom (but excluding consideration of individual cases)[53]. It is suggested, that the parliamentary committee for Human Rights in the Maltese Parliament ought to be closely modelled on the UK Joint Committee on Human Rights, with particular reference to the enforcement mechanisms that are adopted by this committee.

15. Conclusion

The Office of the Attorney General is currently tasked with overseeing the execution of judgments of the ECtHR, drafting action plans to the Committee of Ministers and the overall implementation of general measures. The Office of the

Attorney General is also Malta's representative at the ECtHR and protects the interests of the State in this regard. This dual role played by the Office of the Attorney General is clearly conflicting.

It is therefore suggested that a single-focus parliamentary committee on human rights issues is set up and granted extensive terms of reference that would include the evaluation of information submitted by the Committee of Ministers on the level of execution of ECtHR judgments, the monitoring of judgments delivered by the ECtHR and the local courts, and the preparation of opinions, recommendations and draft legislative proposals for the implementation of general measures. As a result of this, the role and responsibilities currently held by the Attorney General would be shifted to this parliamentary committee working in conjunction with the NHRI. It is therefore being submitted that once the Maltese State is notified of the judgment handed by the ECtHR, the NHRI will set to work in researching how best the execute a judgment through the implementation of effective general measures. This information would then be handed over to the parliamentary committee to further decide on concrete methods of execution.

It is through the creation of formalised channels for the effective execution of the judgments delivered by the ECtHR that the aim of creating a human rights culture can truly be achieved.

[51] P. Webb, K. Roberts, (Dicksom Poon School of Law, King's College, 2014) Effective Parliamentary Oversight of Human Rights, A Framework for Designing and Determining Effectiveness, p.4

[52] Standing Orders of the House of Commons - Public Business 2002(2) No. 152B

[53] Ibid. (2)(a)

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